Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5–28–539 OF 2001
KANG HWEE GEE J
24 JANUARY 2002

Companies and Corporations — *Winding up — Opposition to petition — Joint judgment debtors — Whether judgment creditor could choose on whom to enforce judgment sum — Whether issue of statutory notice against one respondent irregular — Whether respondent prejudiced*

The petitioner applied to wind up the respondent company on the ground that it was unable to pay its debt. The debt arose from an arbitration award. In the final award, the arbitrator had adjudged and directed the respondents to pay two sums to the petitioner. The respondent opposed the petition solely on the account what he perceived to be an irregularity in that the arbitration award was against two joint respondents. It was argued that it was not opened to the petitioner to proceed against only one respondent.

Held, allowing the petition with costs:

(1) When a judgment debtor was under a joint liability with another to pay a debt, either of them may have to bear the whole of that liability all by himself to the creditor up to the limit of the judgment sum. From the standpoint of the judgment creditor, that liability was several in the sense that he was at liberty to choose on whom to enforce the judgment sum whether only on one judgment debtor individually or on both collectively. That principle had never been in dispute (see pp 294I–295A). Therefore, the petitioner was at liberty to issue the notice whether against both the judgment debtors on a joint basis, or as it had done in this instance, only against the respondent without prejudice to its right to issue another on the other judgment debtor (see p 295E–F).

(2) There was nothing irregular in the statutory notice. It could only have been irregular if the respondent would be prejudiced in that it would not be able to know how the winding up had been brought about, and therefore, would not be able to respond to the issuance. There was no question of that happening as a copy of the arbitration award as well as the enforcement order of the High Court had been exhibited with the petition and the judgment debtor had full knowledge of what transpired therein (see p 295D–E).

[Bahasa Malaysia summary

Pempetisyen telah memohon agar syarikat responden digulungkan atas alasan bahawa ia tidak mempu membayar hutangnya. Hutang

tersebut timbul daripada satu award timbangtara. Dalam award muktamad tersebut, penimbangtara telah menghukum dan mengarahkan responden-responden membayar kedua-dua jumlah tersebut kepada pempetisyen. Responden membuat bantahan terhadap petisyen tersebut berdasarkan apa yang beliau lihat sebagai satu luar aturan di mana award timbangtara tersebut adalah terhadap dua responden bersesama. Adalah dihujahkan bahawa ia tidak terbuka kepada pempetisyen untuk memulakan tindakan terhadap hanya seorang responden.

Diputuskan, membenarkan petisyen tersebut dengan kos:

(1) Apabila seorang penghutang penghakiman di bawah satu liabiliti bersama dengan satu pihak lagi untuk membayar hutang, salah satu daripada mereka mungkin terpaksa menanggung keseluruhan liabiliti dengan sendiri terhadap pemiutang sehingga had jumlah penghakiman. Daripada sudut pemiutang penghakiman, liabiliti tersebut adalah berasingan dalam erti kata bahawa beliau mempunyai kebebasan untuk memilih sesiapa bagi menguatkuasakan jumlah penghakiman tersebut sama ada hanya ke atas seorang penghutang penghakiman secara individual atau ke atas kedua-duanya secara kolektif. Prinsip ini tidak pernah dipertikaikan (lihat ms 294I–295A). Oleh itu, pempetisyen mempunyai kebebasan untuk mengeluarkan notis sama ada terhadap kedua-dua penghutang penghakiman atas dasar bersama, atau sebagaimana ia telah lakukan dakam kes ini, hanya terhadap responden tanpa prejudis berhubung hak beliau untuk mengeluarkan satu lagi ke atas seorang lagi penghutang penghakiman (lihat ms 295E–F).

(2) Tiada apa-apa yang di luar aturan dalam notis statutori tersebut. Ia hanya akan menjadi luar aturan jika responden diprejudiskan di mana ia tidak berupaya mengetahui bagaimana penggulungan tersebut dimulakan, dan oleh itu, tidak berupaya untuk menjawab terhadap pengeluaran notis tersebut. Ini tidak akan berlaku kerana satu salinan award timbangtara dan juga perintah penguatkuasaan Mahkamah Tinggi telahpun diekshibitkan bersama petisyen dan penghutang penghakiman mempunyai pengetahuan penuh tentang apa yang berlaku (lihat ms 295D–E).]

Notes

For cases on opposition to petition generally, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 973–995.

Cases referred to

Balasubramaniam; ex p Annamalai (1957) 3 MC 128 (refd)
Low, Re; ex p Gibson (1895) QB 734 (refd)
Yeo Ah Wang lwn United Malayan Banking Corp Bhd [1991] 1 AMR 38 (refd)

Legislation referred to

Arbitration Act 1952
Bankruptcy Act 1883 [Eng]
Companies Act 1965 ss 143, 218(2)

A Mahendran (*KL Wong* with him) (*Nik Hussain & Partners*) for the petitioner.

Paul Ong (*SS Soo* with him) (*Paul Ong & Associates*) for the respondent.

Kang Hwee Gee J: This is a petition by the petitioner to wind up the respondent company on the ground that it was unable to pay its debt pursuant to the issuance of the statutory notice under s 218 of the Companies Act 1965 ('the Act'). The notice required the respondent to pay the sum of RM12,099,825.17 and a further sum S$166,439.89 within the stipulated 21 days from the date of the receipt of the notice.

The respondent did not comply with the notice and hence rendered itself liable to the deeming provision under s 218(2) of the Act that it was unable to pay its debt.

The debt arose from an arbitration award in an arbitration proceeding that the parties had subjected themselves to under the Arbitration Act 1952. The relevant orders of the final award in so far as it concerns this petition are two sums which the arbitrators had adjudged and directed the respondents to pay to the petitioner. They are the award sum of RM12,099,825.17 and the aggregate costs of the award of S$226,439.89.

Leave to enforce the award was obtained by the petitioner against the respondent from High Court vide an order dated 14 February 2001 in Kuala Lumpur Civil Suit No R1–24–64–2000.

The petition is opposed by the respondent solely on account of what the respondent perceived to be an irregularity in that the arbitration award which the petitioner obtained was against two joint respondents. It was not open to the petitioner, so it was argued, to commence winding up proceedings against only one respondent.

There is no direct case law on this point, so I am informed by counsel, with respect to the legality of commencing a winding up petition against only one company based on a judgment obtained jointly against two companies. But there are a number of decisions where bankruptcy petitions were presented against one only of two or more joint judgment debtors.

Counsel for the respondent relied on the judgement of Shaik Daud J (as he then was) in *Yeo Ah Wang lwn United Malayan Banking Corp Bhd* [1991] 1 AMR 38 where a bankruptcy notice was issued from a judgment obtained jointly against three defendants. The judgment creditor issued a judgment notice only against one of the defendants. It was held that a judgment notice was bad in law as it was contrary to the judgment in which all the three defendants were found jointly liable to pay the judgment debt.

However, in the older case of *Balasubramaniam; ex p Annamalai* (1957) 3 MC 128, Sutherland J held that it was perfectly in order for the judgment creditor in that case to issue a judgment notice against a co-defendant who

had been adjudged jointly liable to pay the judgment of the judgment creditor.

But Sutherland J spoke with high authority and I am inclined to agree with him. He relied on the English Court of Appeal case of *Re Low; ex p Gibson* [1895] QB 734 wherein Lord Esher MR, having to rule on a similar point whether a judgment notice under the English Bankruptcy Act 1883 involving a judgment debt entered against joint judgment debtors.

I have no doubt that Sutherland J was correct. The reasoning of Lord Esher MR in *Re Low; ex p Gibson* could not have been clearer. Two convincing arguments were put before the court in that case.

First, it was argued that a writ of execution based on a joint obligation to pay the judgment creditor's debt had always been joint, and since a bankruptcy notice depends on the judgment creditors right to execution, the notice should be directed to the debtor and all the other joint debtors, although it need not be served on those against whom it was not intended to proceed.

Secondly, the non-compliance of a judgment notice carried with it a semi-penal consequence which makes it essential for the judgment creditor to follow the forms of the judgment by citing all the judgment debtors jointly, and not just one of them, as was done in that case. It was not open to the judgment creditor to amend the judgement notice under s 143 of the Act — for to do so would be to create an act of bankruptcy for the judgment creditor when in the first instance the judgment debtor had not known what the act of bankruptcy against him was about.

Both the arguments were rejected. Lord Esher MR in his short judgment (Lopes LJ concurring) ruled as follows at p 736:

> The debtor was well aware of the fact that the action was against all six persons named, and he also knew that the judgment was against him and three of the other defendants. He could be in no doubt as to the identity of the action, and it is obvious that the point put forward to invalidate the notice was merely a formal objection, and that the defect in the notice could not work any injustice. The irregularity was unimportant and could be amended, and the notice could not be treated as bad.
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> The other point raised is not one on which the notice should be set aside. It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants, although it need only be served on the one it is desired to make bankrupt. I fail to see what good it can do that one to have the names of the others put in the notice when there is absolutely no necessity for serving it on them. This is a technicality to which we ought not to listen.

Much confusion has arisen in the matter because of the difficulty in understanding the effect of a joint liability which two or more losing defendants have to bear vis-a-vis the right of the winning plaintiff to enforce the judgment debt.

One must appreciate that when a judgment debtor is under a joint liability with another to pay a debt, either of them may have to bear the whole of that liability all by himself to the creditor up to the limit of the

judgment sum. From the standpoint of the judgment creditor, that liability is several in the sense that he is at liberty to choose on whom to enforce the judgment sum whether only on one judgment debtor individually or on both collectively. That principle had never been in dispute and had in fact been confirmed in the judgment of Lord Esher MR in *Re Low*.

What was in dispute in *Re Low* was whether the judgment notice was irregular in having cited only one of the six joint judgment debtors as the respondent. That issue had been resolved in favour of the judgment creditor.

Both *Balasubramaniam; ex p Annamalai* and *Re Low; ex p Gibson* were decisions in respect of the issuance of a bankruptcy notice under bankruptcy law. They were not decisions relating to the issuance of a statutory notice under the law of companies. But its applicability with respect to the joinder and non-joinder of joint judgment debtors could not have been any different — given the similarities in both form and substance between a bankruptcy petition against a natural person, and a winding up petition against a company arising from its inability to pay its debt.

Applying the rationale in *Re Low*, it is clear to me that there is nothing irregular in the statutory notice. It could only have been irregular if the respondent in this case would be prejudiced in that it would not be able to know how the winding up had been brought about, and therefore, would not be able to respond to the issuance. There is no question of that happening as a copy of the arbitration award as well as the enforcement order of the High Court had been exhibited with the petition and the judgment debtor had full knowledge of what transpired therein.

The petitioner is at liberty to issue the notice whether against both the judgment debtors on a joint basis, or as it has done in this instance, only against the respondent without prejudice to its right to issue another on the other judgment debtor.

The petition is allowed with costs.

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Reported by Chew Phye Ken